

State of California
Department of Fish and Wildlife



Memorandum

Date: June 22, 2021

Governor's Office of Planning & Research

To: Mr. Phillip Zoucha
State Water Resources Control Board
Division of Water Rights
Post Office Box 2000
Sacramento, CA 95812-2000
Phillip.Zoucha@waterboards.ca.gov

June 23 2021

STATE CLEARINGHOUSE

DocuSigned by:

Gregg Erickson

From: Gregg Erickson, Regional Manager
California Department of Fish and Wildlife-Bay Delta Region, 2825 Cordelia Road, Suite 100, Fairfield, CA 94534

Subject: Application A030949 to Appropriate Water by Permit – Lynch Canyon Reservoir,
SCH No. 2021060018, Solano County

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) from the State Water Resources Control Board (Water Board) for the Application A030949 to Appropriate Water by Permit – Lynch Canyon Reservoir (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

CDFW appreciates our involvement in the long-standing and ongoing communication and coordination related to this Project. We are submitting comments on the MND to inform the Board, as the Lead Agency, of our concerns regarding potentially significant impacts to sensitive resources associated with the Project.

CDFW ROLE

CDFW is a **Trustee Agency** with responsibility under CEQA pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources. CDFW is also considered a **Responsible Agency** if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA) or Native Plant Protection Act, a Lake and Streambed Alteration (LSA) Agreement, or other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

PROJECT DESCRIPTION SUMMARY

Proponent: Solano Land Trust and Ron and Ralph Azevedo

¹ CEQA is codified in the California Public Resources Code in Section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with Section 15000.

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Objective: The Project would: 1) divert up to 47 acre-feet of water per year from the North Fork of Lynch Canyon Creek to storage within the existing, on-stream Lynch Canyon Reservoir (Reservoir); 2) reduce the elevation of the Reservoir spillway structure by three feet; 3) install rock riprap and rock weirs in the North Fork of Lynch Canyon Creek downstream of the Reservoir; 4) install a siphon and pump system in the Reservoir; and 5) conduct associated vegetation removal and dam infrastructure activities. Lynch Canyon Reservoir is used for stock watering, recreation, and habitat for fish and wildlife. The Project would reduce the size of the reservoir and acquire the necessary water right to maintain the diversion. Project activities include water diversion, road grading, excavation, placement of riprap, disposal of excess soil, concrete pouring, construction of cattle exclusion fencing, vegetation removal, and associated construction activities.

Location: The Project is located at Lynch Canyon Reservoir, on the North Fork of Lynch Canyon Creek, in unincorporated Solano County approximately 1.5 miles west of the City of Fairfield. It is approximately one mile northwest of the intersection of Lynch Road and McGary Road. The approximate centroid of the Project is Latitude 38.19529°N, Longitude 122.19292°W and the Assessor's Parcel Numbers are 0180-030-050 and 0180-040-040.

Timeframe: The Project's seasonal water diversion will occur annually between October 1 and June 1. Project construction activities are anticipated to take approximately two weeks between mid-August and mid-October.

ENVIRONMENTAL SETTING

The Project is surrounded by rangeland, agriculture, and open space in Solano County. The Reservoir was created by the construction of an unpermitted dam in 1960 and is fed by upstream groundwater-fed springs and ephemeral streams. The Reservoir discharges into a seasonally wet meadow which becomes the North Fork of Lynch Canyon Creek approximately 800 feet downstream of the Reservoir. Wetland emergent vegetation grows in the Reservoir and a mature riparian canopy, dominated by coast live oak (*Quercus agrifolia*), is present along the North Fork of Lynch Canyon Creek. Special-status species with the potential to occur on or near the Project include, but are not limited to, Swainson's hawk (*Buteo swainsoni*), listed as threatened pursuant to CESA; Tricolored blackbird (*Agelaius tricolor*), listed as threatened pursuant to CESA; California red-legged frog (*Rana draytonii*), listed as threatened pursuant to the federal Endangered Species Act (ESA) and a California Species of Special Concern (SSC); western pond turtle (*Emys marmorata*), SSC; and burrowing owl (*Athene cunicularia*), SSC.

REGULATORY REQUIREMENTS

Lake and Streambed Alteration Agreement

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et seq., for project activities affecting lakes or streams and associated riparian habitat.

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Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. Examples of activities that require notification include diverting water from a river, stream, or lake for domestic use or irrigation and, as in this case, impounding water in an on-stream reservoir. Because this project involves diversion of water, the Permittee must include a supplement to the notification, known as Attachment C. Please note there is a notification fee associated with this process. Procedures for submitting a notification form can be found at: <https://www.wildlife.ca.gov/Conservation/LSA/Forms>

The MND identifies that CDFW will likely be a Responsible Agency pursuant to our LSA authority (MND page 15). CDFW agrees that the Project activities, including those associated with Reservoir construction, wetland vegetation removal, and work within the North Fork of Lynch Canyon Creek, require an LSA Notification. In this case, CDFW will consider the CEQA document for the Project to issue an LSA Agreement. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

Additionally, it should be noted that sufficient instream flows are also a requirement of Fish and Game Code Section 5937 which states: *The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. This requirement applies not only to the stream directly below the dam, but any fish bearing streams further down in the watershed as well which may be impacted by the diversion and/or obstruction of natural flow.*

Notifying CDFW regarding the diversion is the best way to ensure compliance with Fish and Game Codes 1602 and 5937.

California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, such as tricolored blackbird or Swainson's hawk, either during construction or over the life of the Project. Issuance of an ITP is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain an ITP.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened or endangered species. (Pub. Resources Code, §§ 21001, subd. (c) & 21083; CEQA Guidelines, §§ 15380, 15064,

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and 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the project proponent's obligation to comply with CESA.

Raptors and Other Nesting Birds

CDFW also has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nests or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal Migratory Bird Treaty Act.

Fully Protected Species

Fully Protected species may not be taken or possessed at any time (Fish and Game Code, §§ 3511, 4700, 5050, and 5515).

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the Board in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

Environmental Setting and Related Impact Shortcoming

Swainson's Hawk

The MND identifies that Swainson's hawk, listed as threatened pursuant to CESA, may occur within the Project site, which provides suitable foraging habitat, and has been observed at the Lunch Canyon Open Space property (MND page 68). Potentially suitable nesting trees exist in the vicinity of the Project site. In addition, the MND notes there are California Natural Diversity Database (CNDDDB) occurrences of nesting Swainson's hawk within five miles of the Project (MND page 68), and the California Wildlife Habitat Relationships Predicted Habitat Suitability for the site is High Suitability. The MND does not require Swainson's hawk protocol surveys prior to Project activities, relying instead on pre-construction nesting bird surveys identified in Mitigation Measure (MM) BIO-4 and the likelihood that activities will occur outside of the nesting season. MM BIO-4 specifies that surveys for nesting bird nests will occur within a 500-foot radius of proposed construction areas no more than 14 days prior to the start of construction activities. MM BIO-4 does not provide adequate survey techniques to effectively identify nesting Swainson's hawk in and near the Project area. In addition, the timing of the Project could overlap with the end of Swainson's hawk nesting season.

The breeding population of Swainson's hawks in California has declined by an estimated 91% since 1900 and the species continues to be threatened by on-going and cumulative loss of foraging habitat (CDFW 2016). Swainson's hawks could be disturbed by Project activities, resulting in potentially significant impact to Swainson's hawk through nest abandonment or reduced health and vigor of young. To reduce impacts to less-than-significant, CDFW recommends including the following Mitigation Measure:

Mitigation Measure BIO-10: Swainson's Hawk Surveys

If Project activities are scheduled during the nesting season for Swainson's hawks (March 1 to September 15), prior to beginning work on the Project, a qualified biologist shall conduct surveys according to the *Recommended timing and methodology for Swainson's Hawk Nesting Surveys in California's Central Valley*.² Survey methods should be closely followed by starting early in the nesting season (late March to early April) to maximize the likelihood of detecting an active nest (nests, adults, and chicks are more difficult to detect later in the growing season because trees become less transparent as vegetation increases). Surveys shall be conducted: 1) within a minimum 0.5-mile radius of the Project site or a larger area if needed to identify potentially impacted active nests, and 2) for at least the two survey periods immediately prior to initiating Project-related construction activities. Surveys shall occur annually for the duration of the Project. The qualified biologist shall have a minimum of two years of experience implementing the survey methodology resulting in detections. If active Swainson's hawk nests are detected, the Project shall implement a 0.5-mile construction avoidance buffer around the nest until the nest is no longer active as determined by a qualified biologist. If take of Swainson's hawk cannot be avoided, the Project shall consult with CDFW pursuant to CESA and obtain an ITP. CDFW Bay Delta Region staff is available to provide guidance on the ITP application process.

Tricolored Blackbird

The MND recognizes that tricolored blackbird, listed as threatened pursuant to CESA, has the potential of occurring within the Project area and nesting in emergent vegetation in the marshlands (MND page 70). The MND also identifies tricolored blackbird as a candidate species for listing under CESA and a species of special concern (MND page 70). Please revise the status of tricolored blackbird to reflect that it is now **listed as threatened pursuant to CESA** [Cal. Code Regs. §670.5, subd. (b)(5)(H)]. In addition, the MND relies on an outdated CNDDDB record search from 2011 which documents no occurrences of tricolored blackbird within 5 miles of the Project. A recent CNDDDB search (June 2021) identifies four occurrences of tricolored blackbird colonies within five miles of the Project, one of which occurs **within the Reservoir**. The MND proposed to rely on pre-construction nesting bird surveys identified in MM BIO-4 to identify and avoid impacts to nesting tricolored blackbirds. This measure requires nesting bird surveys to occur within the Project area and the 500 feet surrounding the Project area and

² Swainson's Hawk Technical Advisory Committee, 2000.
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83990&inline>

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identifies that active migratory bird nests shall receive a 250-foot no-disturbance buffer (page 3-12).

The statewide tricolored blackbird population has declined between 75% and 90% over the last 25 years and remains at or near its smallest recorded size (CDFW 2018). Project activities that occur between February 15 and August 31 could disturb nesting tricolored blackbirds leading to reduced nest success, nest abandonment, and potential mortality of young. In addition, the Project's removal of emergent vegetation and reduction to pond size may result in a permanent reduction of potential tricolored blackbird nesting habitat. Based on the above, the Project may potentially significantly impact tricolored blackbirds.

To reduce impacts to less-than-significant, CDFW recommends:

- 1) Further assessing and quantifying the emergent vegetation removal to determine whether potential tricolored blackbird habitat would be permanently lost. In addition, changes to the size of the Reservoir should be analyzed for long-term loss of emergent vegetation that serves as potential tricolored blackbird nesting habitat. Permanent impacts to nesting habitat should be mitigated through on-site creation of habitat within the same year habitat was removed, or, permanent preservation of habitat occupied by tricolored blackbirds, at a 2:1 mitigation to impact ratio, through a conservation easement and provision of an endowment for long-term management.
- 2) A qualified biologist should identify an appropriate no-disturbance buffer, at least 300 feet, around identified nesting colonies (CDFW 2015). If colonies are identified in the Project area and may be disturbed by Project activities, CDFW should be immediately notified. Consultation pursuant to CESA is warranted if the Project could lead to incidental take of tricolored blackbirds.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations [Pub. Resources Code, § 21003, subd. (e)]. Accordingly, please report any special-status species and natural communities detected during Project surveys to the CNDDDB. The CNDDDB field survey form, online field survey form, and contact information for CNDDDB staff can be found at the following link: <https://wildlife.ca.gov/data/CNDDDB/submitting-data>.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required for the underlying Project approval to be

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operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish and Game Code, § 711.4; Pub. Resources Code, § 21089).

CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist the Board in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination, please contact Mrs. Jessica Maxfield, Water Rights Coordinator, at jessica.maxfield@wildlife.ca.gov; or Mr. Craig Weighman, Environmental Program Manager, at craig.weightman@wildlife.ca.gov.

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2021060018)

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REFERENCES

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- CDFW. 2018. Report to the Fish and Game Commission: A Status Review of the Tricolored Blackbird (*Agelaius tricolor*) in California. State of California Natural Resources Agency, Sacramento, CA.
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